SUPREME COURT, U.S.
FILED
MAY 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL,

Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Respondents.

PETITION OF MANHATTAN EYE, EAR & THROAT HOSPITAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Francis Carling
Counsel of Record for Petitioner

Leo T. Crowley
Rebecca Q. Boucher
of
WINTHROP, STIMSON, PUTNAM
& ROBERTS
40 Wall Street
New York, New York 10005
(212) 943-0700

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit and the NLRB erred in refusing to give effect to the employer's valid withdrawal of recognition of a union that no longer enjoyed majority support, because of an unrelated de minimis employer unfair labor practice that did not involve the anti-union majority?

2. Whether the Second Circuit and the NLRB erred in holding that statements to employees made by a supervisor, without any coercion, threat, or promise of benefit, constituted an unfair labor practice?

PARTIES

The following are the parties who appeared before the Second Circuit Court of Appeals in this case:

National Labor Relations Board, Petitioner.

Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO

Manhattan Eye, Ear & Throat Hospital, Respondent.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdictional Statement	2
Relevant Statutes and Constitutional Provisions	3
Statement of the Case	5
Argument	18
I. The Decision Below that the Hospital Violated § 8(a)(5) of the Act Abrogates the Nurses' Right of Self Determination Under § 7 of the Act.	18

TABLE OF CONTENTS
(cont'd)

		Page
II.	The Decision Below that the Hospital Violated § 8(a)(1) of the Act Abrogates the Hospital's Right of Free Speech Protected by the United States Constitution and § 8(c) of the Act.	29
III.	The Questions Presented Deserve Supreme Court Review Because the Decision Below Conflicts With Those of Other Circuits and Because Such Questions Are Likely to Recur.	38
Conclusion		42

TABLE OF AUTHORITIES

Cases	Pages
Daisy's Original, Inc. v. NLRB, 468 F.2d 493 (5th Cir. 1972)	22, 23, 28
Frito-Lay, Inc. v. NLRB, 585 F.2d 62 (3d Cir. 1978)	35
Hotel, Motel and Restaurant Employees and Bartenders Union v. NLRB, 785 F.2d 796 (9th Cir. 1986)	25
National Cash Register Co. v. NLRB, 494 F.2d 189 (8th Cir. 1974)	25
NLRB v. A & S Electronic Die Corp., 423 F.2d 218 (2d Cir), cert. denied, 400 U.S. 833 (1970)	33
NLRB v. Anvil Products, Inc., 496 F.2d 94 (5th Cir. 1974)	26
NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280 (6th Cir. 1981)	35
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	passim
NLRB v. Lenkurt Electric Co., 438 F.2d 1102 (9th Cir. 1971)	35

TABLE OF AUTHORITIES
(cont'd)

Cases	Pages
NLRB v. NuSouthern Dyeing & Finishing, Inc., 444 F.2d 11 (4th Cir. 1971)	25
NLRB v. Superior Sales, Inc., 366 F.2d 229 (8th Cir. 1966)	33
NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941)	35
Peoples Gas System, Inc. v. NLRB, 629 F.2d 35 (D.C. Cir 1980)	26, 28, 41,
Pittsburg and New England Trucking Co. v. NLRB, 643 F.2d 175 (4th Cir. 1981)	25
Texaco, Inc. v. NLRB, 722 F.2d 1226 (5th Cir. 1984)	33, 34
Constitutional Provisions	
United States Constitution, First Amendment	4, 19

TABLE OF AUTHORITIES
(cont'd)

	Pages
Statutes	
National Labor Relations Act, § 7, 29 U.S.C § 157	passim
National Labor Relations Act, § 8, 29 U.S.C. § 158	passim
National Labor Relations Act, § 10(e), 29 U.S.C. § 160(e)	21
28 U.S.C. § 1254(1)	2 - 3
Regulations	
29 C.F.R. § 101.12	21
Other	
Second Circuit Court of Appeals, Judicial Business of the Second Circuit	6
Congressional Research Service "Report on Implication for Economic Policy and Labor Legislation of Decline in Union Membership," reprinted in BNA Daily Labor Report June 13, 1987, at D-1 to D-12	39

No.

In the Supreme Court of the United States

October Term, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO

Respondents.

PETITION OF
MANHATTAN EYE, EAR & THROAT HOSPITAL
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of Administrative Law Judge Lawrence, dated August 16,

1985, is not reported. A copy is included in the separately bound appendix to this Petition at A1-A108. The opinion of the National Labor Relations Board (the "Board") is dated May 30, 1986 and is reported at 280 NLRB No. 11; a copy is included in the Appendix at A109-A130. The decision of the Second Circuit Court of Appeals enforcing the NLRB's order was entered February 6, 1987 and is not yet reported; a copy is included in the Appendix at A131-A133. The Second Circuit's decision denying petitioner's petition for rehearing was entered March 31, 1987 and is not reported; a copy is included in the Appendix at A134-A135.

JURISDICTIONAL STATEMENT

Manhattan Eye, Ear & Throat Hospital (the "Hospital") seeks to invoke the Court's jurisdiction under 28

U.S.C. § 1254(1). The judgment of which review is sought was entered in the Second Circuit Court of Appeals on February 6, 1987, and the Second Circuit's order denying the petition for rehearing was entered on March 31, 1987.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c):

> The expressing of any views, argument, or opinion, or the

> dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sections 8(a)(1),(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1),(5):

> (a) It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE

The Hospital seeks review of a Second Circuit decision enforcing a Board bargaining order which nullified a plea by the majority of a bargaining unit that recognition of an incumbent union be withdrawn. The Board's only basis for nullifying the will of the majority was a finding of an earlier de minimis unfair labor practice that had no nexus to the demand for withdrawal of recognition. As to the unfair labor practice itself, the Board's decision disregarded Section 8(c) of the National Labor Relations Act (the "Act") and the First Amendment, in finding a violation which consisted of nothing but an expression of opinion, with no threat, coercion or promise of benefit. On both counts, the Second Circuit's enforcement of the Board's decision represents a

significant curtailment of rights heretofore recognized to be guaranteed by the Act: with respect to the employees, their right freely to choose or reject their representative in accordance with Section 7 of the Act, and with respect to the employer, the right of supervisors to exercise free speech in accordance with Section 8(c) of the Act. Because the Second Circuit's endorsement[1] of the Board's

---

[1] Although the Second Circuit in this case acted by summary order rather than by formal published opinion, that is of no moment here. Such dispositions have become commonplace in the Second Circuit. According to the Second Circuit's recent report titled "Judicial Business of the Second Circuit," in recent years the percentage of its cases disposed of by summary order or oral decision ranged from 54% to 65.7%. Furthermore, since the fact that the Second Circuit granted the Board's petition for enforcement will doubtless be reported (even though the text of the summary order is not expected to be published), the Board's opinion in this case has for all practical purposes become the law of the Circuit.

new, restricted reading of those provisions conflicts fundamentally with the statutory scheme fashioned by Congress and with the interpretation of other circuits (especially with respect to the propriety of a finding of a violation of Section 8(a)(5) and consequent entry of a bargaining order under this Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)), the Hospital respectfully petitions this Court to issue a writ of certiorari.

The Facts

Petitioner Manhattan Eye, Ear & Throat Hospital, the employer, is a specialty surgical Hospital located on the Upper East Side of Manhattan in New York City. In the summer of 1984, it became embroiled in a citywide hospital strike called by District (now Local)

1199 of the Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO (the "Union"). The Union represented separate bargaining units of service workers and registered nurses at the Hospital. The strike was called to secure a benefit for the service workers which was already enjoyed by the nurses; though the nurses, to that extent, had nothing at stake, they were required to join the strike under threat of Union fines. ALJ Dec. A5.[2] Five days after the strike began -- and before the

---

[2] References preceded by "ALJ Dec." or "Board Dec." are to the decisions of the Administrative Law Judge or of the Board, followed by the page of the Appendix where the referenced material may be found. The facts set forth herein are either undisputed facts supported by the record in the Court of Appeals or facts found by the Administrative Law Judge; as to the latter, the Board affirmed those findings to the extent consistent with its Decision and Order. Board Dec. A110.

unfair labor practice alleged in this case had occurred -- a group of nurses at the Hospital filed a decertification petition with the Board. ALJ Dec. A6-A7. An election to determine whether the Union still had the support of a majority of the nurses at the Hospital was scheduled by the Board for August 30, 1984.

After the decertification petition was filed, nurses began to cross the picket line and return to work in greater and greater numbers. Many of these nurses resigned from the Union before crossing the picket line, to protect themselves from Union fines; that they were doing so was widely known, and a frequent topic of conversation among the nurses at the Hospital. ALJ Dec. A62-A63. As more nurses returned to work, the Hospital opened more floors and admitted more

patients. In order to plan this process more efficiently, the Hospital made inquiries of the nurses who had not yet returned to work as to their plans in that regard. ALJ Dec. A47. There is no dispute that those inquiries in and of themselves were perfectly lawful.

A part-time weekend relief supervisor at the Hospital, Euphemia James, whose regular job was as a staff nurse at a local Veterans' Hospital, was campaigning in this period for re-election to the presidency of the Philippine Nurses Association. Part of her campaign involved making telephone calls to Filipino nurses all over the city, including her co-workers at the Hospital. When she told the Hospital that she was making such calls, she was asked, while she was at it, to find out whether any of the Hospital's nurses with whom she spoke intended to come

back to work. ALJ Dec. A47. In doing so, James apparently took it upon herself to express the view to a few nurses that, if they decided to return to work (which necessarily would have entailed crossing the picket line), it would be advisable to resign from the Union first. ALJ Dec. A48-A69. The handful of nurses with whom James spoke conceded at the hearing below that she did not threaten them or promise them any benefit; that they did not feel in any way coerced by her suggestions; and that they did not alter their behavior as a result. ALJ Dec. A67-A68. The nurses told James that they would make up their own minds about whether to come back to work. ALJ Dec. A35-A46.

When the Union learned of these conversations, it filed an unfair labor practice charge to block the upcoming secret ballot election. The Board

cancelled the election pending further investigation of the charge. The nurses who had been campaigning for decertification, chagrined at the election cancellation and concerned that, as the strike came to a close, a collective bargaining agreement would be negotiated for them by a union which no longer enjoyed majority support, immediately launched a new campaign to prevent the Hospital from bargaining further with the Union. Within two weeks, a majority of the staff nurses had signed cards demanding that the Hospital no longer recognize the Union as their representative. Significantly, those cards (which were in evidence before the ALJ) revealed that the anti-union majority who signed them did not include <u>any</u> of the nurses who were party to the conversations which the Board later found to be an unfair labor

practice. Even more significantly, there was no evidence before the Board that any nurse in the anti-union majority even knew about the conversations which constituted the unfair labor practice. On September 6, 1984, the cards demanding withdrawal of recognition were presented to Hospital management. On the basis of this clear expression of majority sentiment, and the obligations created thereby under Section 7 of the Act, the Hospital withdrew recognition of the Union on September 7. ALJ Dec. A8, A80-A82. More charges from the Union followed.

The Proceedings Below

The Board's General Counsel issued a series of unfair labor practice complaints based on the Union's charges, which were consolidated and tried on March 4-8, 1985, before Administrative

Law Judge Harold B. Lawrence (the "ALJ"). The ALJ's decision was issued on August 16, 1985. A1-A108. With respect to the charge concerning James,[3] the ALJ credited the Union's witnesses' versions of their conversations with James, but held that James had committed no unfair labor practice. In view of the widespread discussion and knowledge about nurses resigning from the Union, he found it impossible to determine from the evidence presented whether James' suggestion that nurses resign was intended to protect them from fines, or was meant to cause general disaffection from the Union. Since the Board's General Counsel bore the burden of proof on this issue, and the preponderance of

---

[3] The ALJ's dismissal of all the charges except for the one involving James was sustained by the Board, so those charges are not discussed here.

the evidence did not support the more sinister inference, the ALJ dismissed the complaint. ALJ Dec. A59-A61.

The Board's General Counsel took no exception to the ALJ's dismissal of the charges concerning James, but the Union took exception in that regard. On May 30, 1986, the Board issued its decision and order which was enforced by the Second Circuit and which is therefore at issue here. A109-A130. The Board affirmed all of the ALJ's findings and conclusions, except with respect to James. As to that charge, the Board held that it had not been specifically proven at the hearing that James was referring to the risk of Union fines in giving advice about resigning from the Union; thus, apparently, some more sinister intent should have been presumed by the ALJ (Board Dec. A119-A120), even in the absence of any

evidence that James actually was aiming to create general disaffection from the Union. The Board concluded that the Hospital, through James, had committed an unfair labor practice. Board Dec. A123.

The issue of whether there had been any causal relationship established between James' alleged unfair labor practice and the subsequent demand by a majority of the nurses that recognition be withdrawn had been litigated before the ALJ, but he declined to reach the issue because he found that no unfair labor practice had been committed. ALJ Dec. A89. In taking exception before the Board to that finding, the Union specifically raised the claim -- but did not brief it or otherwise explain its evidentiary basis -- that James' conduct somehow tainted the withdrawal of recognition. The Board not only reversed the ALJ on whether James'

conversations violated Section 8(a)(1) of the Act; it further held that such violation invalidated the Hospital's withdrawal of recognition and that the withdrawal therefore violated Section 8(a)(5). The Board ordered the Hospital to bargain with the Union, thereby nullifying the expressed will of the majority of the nurses that the Union no longer represent them. The Board found the Section 8(a)(5) violation and imposed this drastic remedy without even purporting to find any causal link between James' conversations and the majority petition for withdrawal of recognition. Rather, the Board simply said that the Hospital's good faith doubt as to the Union's majority support did not occur in a "context" free of unfair labor practices aimed at causing union disaffection. Board Dec. A122. Thus, for what was at most a de minimis

violation by a low-level part-time supervisor which neither coerced nor harmed anyone, the Board found a Section 8(a)(5) violation and issued a bargaining order which extinguished the nurses' right to select or reject their representative under Section 7 of the Act.

By summary decision filed on February 6, 1987, the Court of Appeals granted a Board application to enforce its order. A131. On March 31, 1987, the Court of Appeals denied the Hospital's petition for rehearing with a suggestion for rehearing in banc. A134.

ARGUMENT

I. The Decision Below that the Hospital Violated § 8(a)(5) of the Act Abrogates the Nurses' Right of Self Determination Under § 7 of the Act.

Perhaps the most significant aspect of the Board's decision in this

case is not anything it said, but rather what it did not say: The Board never found any causal link between the Hospital's unfair labor practice (assuming that it occurred at all[4]) and the Hospital's withdrawal of recognition of the Union based on a good faith doubt about the Union's majority status. On the contrary, the Board seems to take the position that James' statements automatically precluded the nurses from exercising their rights under Section 7 of the Act: "Having found this violation, we further find that the [Hospital's] asserted good faith doubt of the Union's continued

---

[4] In point II below we show that the Second Circuit erroneously sustained the Board's finding of an unfair labor practice, since the alleged unfair labor practice consisted solely of speech protected by § 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c) and by the First Admendment.

majority status was not raised in a context free of unfair labor practices of the type aimed at causing disaffection from the Union." A124. In other words, the Board is saying that because of the Hospital's unfair labor practice, the Board would not allow the nurses to exercise the rights that Congress guaranteed them in Section 7 of the Act, to "refrain" from bargaining collectively through a union. The Board did not even purport to find that the anti-union majority who petitioned the Hospital to withdraw recognition was even aware of, much less influenced by, James' statements to a few of the other nurses.

To reject the will of the majority in this case, as the Board and the Circuit Court have done, is fundamentally at odds with the purpose of Section 7 of the Act, which includes

protecting the majority's right to refuse representation. Indeed, until the Second Circuit granted the Board's petition for enforcement in this case,[5] the Circuit Courts of Appeal had uniformly held that an unfair labor practice could only invalidate an

---

[5] In the Second Circuit Court of Appeals, counsel for the Board asserted that the Court could not address the absence of a causal link between James' conversations and the majority's petition to the Hospital, under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the Hospital had not raised that issue in the proceedings before the Board (see the Board's brief on appeal, at pp. 19-23). In fact, the issue was before the Board. It had been litigated before the ALJ and therefore before the Board: the Hospital's brief to the ALJ devoted 16 pages to the issue, and the Board's own regulations require that it review the entire record before the ALJ, including the briefs. 29 C.F.R. § 101.12. Furthermore, the Union had raised the issue before the Board itself. The Court of Appeals, in basing its decision on the "substantial evidence" rule rather than on Section 10(e), evidently rejected the Board's argument in this regard.

otherwise proper withdrawal of recognition if there was a causal link between the unfair labor practice and the disaffection of a majority of the bargaining unit, and had refused to enforce Board orders where such a link did not exist.

For example, in Daisy's Originals, Inc. v. NLRB, 468 F.2d 493 (5th Cir. 1972), like here, a possible decertification election was blocked, at first because a current contract was in effect and then because the union filed unfair labor practice charges; under Board policy, the mere filing of unfair labor practice charges blocks an election. Id. at 502. The majority of the employees, having no other means of asserting their Section 7 rights, petitioned the employer directly to withdraw recognition. Id. at 495. The employer refused to bargain with

the union, which then filed unfair labor practice charges under Section 8(a)(5) because of the employer's refusal to bargain. Id. at 496. The Board found that the employer had committed an unfair labor practice in the form of communications to employees that promised benefits if they were not covered by a union contract, and then ruled that the employer had therefore improperly withdrawn recognition of the union in violation of Section 8(a)(5) and ordered the employer to bargain with the union. Id. at 498.

The Court reversed the finding of a Section 8(a)(5) violation and refused to enforce the bargaining order. It noted that a bargaining order has the effect of stripping the employees of their Section 7 rights, and reviewed the law of bargaining orders as a remedy in the wake of the leading case

of NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). 468 F.2d at 499-502. The court then indicated that the same considerations which lead courts to be circumspect in enforcing bargaining orders in the context of a new union should also apply where the bargaining order is in favor of an incumbent union. The court found no violation of Section 8(a)(5) and refused to enforce the bargaining order because "the need to effectuate employee freedom of choice is as equally an important goal as is the need to deter and remedy employer misconduct . . . . Where the unfair labor practices found have not been determined to be 'sufficiently flagrant so that an election could not be held or should be set aside under the Gissel rule,' a bargaining order remedy to technical violations of § 8(a)(1) is unwarranted." 468 F.2d at 503.

See also NLRB v. NuSouthern Dyeing & Finishing, Inc., 444 F.2d 11, 15-16 (4th Cir. 1971) (denies enforcement of Board's bargaining order; the unfair labor practice must "significantly contribute to [the] loss of majority or to the factors upon which a doubt of such a majority is based"); Hotel, Motel and Restaurant Employees and Bartenders Union v. NLRB, 785 F.2d 796, 799 (9th Cir. 1986); Pittsburgh and New England Trucking Co. v. NLRB, 643 F.2d 175, 177 (4th Cir. 1981) (court refuses to enforce the Board's order because, in part, Board adduced no evidence of cause and effect relationship between unfair labor practice and disaffection of the majority of bargaining unit employees from the union); National Cash Register Co. v. NLRB, 494 F.2d 189, 195 (8th Cir. 1974) (court refused to enforce Board's

bargaining order following withdrawal of recognition, because the "record . . . fails to disclose any substantial evidence from which a permissible inference could be made that the unfair labor practices contributed generally to the possible loss of majority status . . ."); NLRB v. Anvil Products, Inc., 496 F.2d 94, 96-98 (5th Cir. 1974); Peoples Gas System, Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980).

The last time this Court extensively addressed the tension between employees' Section 7 rights and the occasional need for bargaining orders to remedy violations of Section 8(a) was in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). That case involved the propriety of a Board finding of a violation of Section 8(a)(5) and consequent bargaining order in the context of an organizational campaign

where the union holds authorization cards from a majority of the employees but the Board finds that employer unfair labor practices interfered with an election. In Gissel this Court held that in certain circumstances the Board could find that an employer unlawfully refused to bargain in violation of Section 8(a)(5) of the Act based on the union's card majority notwithstanding the absence of a union victory in an election and certification, if the employer's unfair labor practices actually adversely affected employees' exercise of their Section 7 rights. Id. at 613-615.

Here, a different but analogous situation is presented: The Union had been certified following an election years earlier, and subsequent events (i.e., the nurses' petition to the Hospital) led the Hospital in good faith to doubt the continued majority support

of the Union and refuse to bargain with the Union. Meanwhile, a relatively minor unfair labor practice was occurring, involving a few nurses who were not among the anti-union majority that had submitted the petition. Until this case, the Circuit Courts of Appeal have viewed such situations as being governed by the same considerations as Gissel, because of the potential interference with employees' rights implicit in a finding of a violation of Section 8(a)(5) in the face of an apparent anti-union majority. Indeed, in Daisy's Originals and other cases cited above, the Circuit Courts of Appeal have, on the basis of Gissel, refused to enforce bargaining orders in circumstances similar to those present here. See, e.g., Peoples Gas System, Inc. v. NLRB, 629 F.2d 35, 47 n.21 (D.C. Cir. 1980) ("in withdrawal of

recognition cases, like Gissel cases, bargaining orders pose a substantial risk of frustrating rather than furthering the purposes of the Act, since they may be contrary to the actual wishes of the employees").

II. The Decision Below that the Hospital Violated § 8(a)(1) of the Act Abrogates the Hospital's Right of Free Speech Protected by the United States Constitution and § 8(c) of the Act.

The second issue raised by the Second Circuit's enforcement of the Board's order is whether pure speech, in the absence of coercive conduct, and without threat or promise of benefit, can ever be an unfair labor practice under the Act. Section 8(c) of the Act confirms the constitutional prohibition against legislative restraint on speech. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). Unlike Point I

above, where the Second Circuit has created a conflict between itself and the other Circuit Courts of Appeal, here the issue is largely novel: Can mere words, unaccompanied by threats or promises of benefit, and without any surrounding coercive conduct, ever constitute an unfair labor practice?

In this case the ALJ found that the evidence was unclear as to whether James was simply informing nurses that if they returned to work during the strike it would be advisable to resign union membership to avoid fines, or whether James was actually seeking resignations to cause disaffection from the Union, thereby interfering with the nurses' rights. Because the Board's General Counsel had the burden of proof on this issue, the ALJ ruled for the Hospital. ALJ Dec. A59-A61. The Board accepted the ALJ's factual findings as

to the contents of the conversations, but reversed the ALJ because it construed the nuances somewhat differently than did the ALJ. The principal difference between the Board and the ALJ on this point is that the ALJ was persuaded by circumstantial evidence that James' conversations may well have been about fines, in that issues relating to crossing the picket line and avoiding Union fines were common topics of discussion among the nurses. ALJ Dec. A61-A63. The Board did not place credence in such circumstantial evidence because of the absence of direct evidence that fines were actually discussed in the particular conversations constituting the alleged unfair labor practice. Board Dec. A118-A120.

We do not dispute the Board's factual findings on this matter. The

subtleties of interpretation that underlie the ALJ's and the Board's differing conclusions underscore why Congress, in enacting Section 8(c), gave pure speech a measure of protection from being found an unfair labor practice. It is therefore hardly surprising that pure speech, absent coercive conduct, or threat or promise of benefit, has never been found an unfair labor practice. The Board's and Second Circuit's position is that, under Section 8(a)(1) of the Act, anti-union words spoken by the employer violate the Act. Section 8(c) of the Act, however, modifies Section 8(a)(1) to the extent of expressly protecting the right of supervisors freely to express their views as long as they make no threat of reprisal or promise of benefit. The only way to reconcile the two sections is to accept the implicit distinction in

the cases between pure speech, protected by Section 8(c), and conduct, proscribed by Section 8(a)(1). See, e.g., NLRB v. Superior Sales, Inc., 366 F.2d 229, 235 (8th Cir. 1966) ("[f]or a statement to be a violation of § 8(a)(1) it must not only fall within the meaning of § 8(a)(1) but also without the protection of § 8(c)").

Only two cases have been cited by the Board for the proposition that mere speech without coercion violates the Act, and both, unlike this case, involved significant coercive conduct surrounding the speech. In NLRB v. A & S Electronic Die Corp., 423 F.2d 218, 221-22 (2d Cir.), cert. denied, 400 U.S. 833 (1970), in addition to expressing pro-union sentiments supervisory personnel actually distributed union authorization cards and urged employees to sign them. In Texaco, Inc. v. NLRB,

722 F.2d 1226 (5th Cir. 1984), in addition to expressing anti-union sentiments, supervisors actively participated in preparing an anti-union petition, and gave employees paid time off to solicit signatures. Id. at 1229. The Court expressly held: "Thus, an employer may not act by way of preference [for or against a union], but may voice preference . . . The right of expressing preference, of course, is protected by the First Amendment and § 8(c) of the Act. . . ." Id. at 1231.

Even if one looks beyond the cases relied upon by the Board and the Second Circuit, there is simply no precedent for refusing the protections of Section 8(c) and the First Amendment in a case such as this. Invariably, the cases finding an unfair labor practice on the basis of employer speech have been predicated upon either extrinsic

evidence of coercion, or on a threat or promise of benefit. Such situations involve, for example: retaliatory threats to close a plant if the union wins a certification election (e.g., Gissel Packing, 395 U.S. at 618-19; Frito-Lay, Inc. v. NLRB, 585 F.2d 62, 65 (3d Cir. 1978)); or making promises of benefits to be provided if the union loses the election (e.g., NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 282 (6th Cir. 1981)).

Where, as here, the speech itself does not embody any threats or promises, the cases consistently require proof of conduct, beyond mere speech, that shows that the speech had a coercive effect or interfered with employees' rights. E.g., NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 478-79 (1941); NLRB v. Lenkurt Electric Co., 438 F.2d 1102, 1107 (9th

Cir. 1971) ("[i]n determining whether an employer's communications constitute permissible argument or prohibited threats, the statements must be considered in the context of the factual background in which they were made, and in view of the totality of employer conduct"). Here, the Board and the Second Circuit relied solely on James' non-threatening words to find that an unfair labor practice occurred. That is a novel and unsupportable interpretation that seriously eviscerates Section 8(c), and deserves this Court's attention and correction.

Under our occasionally lopsided labor jurisprudence, unions have been left free to urge as strenuously as they wish that employees should abandon any loyalty to management. The traditional rationale for not letting employers compete just as strenuously in the

marketplace of ideas -- notwithstanding that it is a fundamental tenet of our system of liberty that free expression of conflicting views is the best path to truth -- was a presumption that free speech by management could easily be coercive, and therefore needs to be restrained. One can question whether that premise, born of the labor strife and violence of the 1930s, justifies restraints on free speech in the vastly different conditions of 1987. Be that as it may, where, as here, there is nothing at issue but an expression of opinion that it would be advisable (and good advice, at that, in view of the risk of union fines) for employees who decide to cross picket lines to resign their union membership first, there is no basis under our Constitution or Section 8(c) to find an unfair labor practice.

III. The Questions Presented Deserve Supreme Court Review Because the Decision Below Conflicts With Those of Other Circuits and Because Such Questions Are Likely to Recur.

Under Point I above we showed that, until this case, the Circuit Courts of Appeal have (i) consistently applied Gissel's reasoning to cases involving withdrawals of recognition; (ii) recognized, in light of Gissel, that to find a violation of Section 8(a)(5) on the basis of another unconnected unfair labor practice, in the face of an apparent anti-union majority, could destroy the employees' Section 7 rights; and (iii) required a causal link between the employer's unfair labor practice and the majority's disaffection from the union as a prerequisite to finding a violation of Section 8(a)(5) and issuing a bargaining order. The Second Circuit now stands

alone in not requiring a causal relationship between the employer's unfair labor practice and the majority's disaffection from the union in circumstances such as those present here.

The importance of this issue, and the need for Supreme Court attention, is emphasized by the general decline in unionization in recent years. See, e.g., "Congressional Research Service Report on Implication for Economic Policy and Labor Legislation of Decline in Union Membership," reprinted in BNA Daily Labor Report June 13, 1986, at D-1 to D-12. That trend suggests that decertification campaigns and employees' demands for withdrawal of recognition of their unions will likely increase as will events like those involved in this case.

The issue is important for a second reason: The law as it now exists in the Second Circuit places an employer in an impossible dilemma when confronted by a demand by a majority of employees that it cease treating their union as their representative. If the employer withdraws recognition, he risks violating Section 8(a)(5) on the basis of some unrelated de minimis unfair labor practice that he might not even know of at the time he is presented with the demand for withdrawal. On the other hand, if the employer goes ahead and negotiates with the union notwithstanding the employees' demand he may violate Section 8(a)(2) of the Act

by improperly favoring the union.[6] See Peoples Gas System v. NLRB, 629 F.2d 35, 37 n.3 (D.C. Cir. 1980).

The general decline of unionization also makes the Section 8(c) issue especially deserving of this Court's consideration. Unions can be expected to fight hard to retain their market share, as it were. To permit pure speech such as that involved here (which, if given the reverse meaning and spoken by the Union would plainly not

---

[6] The consequences for an employer who guesses wrong can be severe. In this case, for example, the Board ordered the Hospital to make up lost contributions to Union benefit funds for a period of over two years (Board Dec. A 123) -- notwithstanding that the nurses' benefits during that period had been paid by the Hospital, not the Union funds. In effect, the Board's order as enforced by the Second Circuit requires the Hospital to incur double liability for the nurses' benefits while the propriety of the Hospital's withdrawal of recognition was being litigated.

have been an unfair labor practice) to constitute an unfair labor practice that voids the majority's anti-union preference gives incumbent unions a powerful weapon that Congress intended to withhold when it enacted Section 8(c).

Conclusion

For the reasons set forth above, the Hospital respectfully requests that its petition be granted.

April 30, 1987

Respectfully submitted,

Francis Carling
Counsel of Record for
Petitioner

Leo T. Crowley
Rebecca Q. Boucher
Winthrop, Stimson, Putnam
& Roberts
40 Wall Street
New York, New York 10005
(212) 943-0700